

Protestant-Dissenters Case :

OR,

The Statute of the 23 of *Eliz. Ca. 1.* Inflicting the Penalty of 20 l. per Month for Not coming to Church, Explained.

Since 'tis a Rule in our Law, that *Ignorance of the Law excuses no man*, 'tis fit every man should be furnished as far as may be with means to understand each Law that concerns him; and seeing the Statute of the 23 *Eliz.* after many years *Dormancy*, begins in some places to be put in Execution upon Protestants, it cannot I humbly conceive, be any Crime or Offence, to offer (with all Modesty and Submission) such reasonable Considerations as may tend towards the Explanation and Understanding the true scope, meaning, and extent of *that Law*: which for more plainness, shall be done by way of stating a Case; Thus,

Suppose an Indictment brought against *A. B.* setting forth — "That the said *A. B.* for a year last past, was an Inhabitant within the Town of *C.* and a Parishioner of the same Town, and by the whole time aforesaid, was of the Age of sixteen years and upwards.

"And that the said *A. B.* from the 10th of August, Anno 34 *Car. 2.* until the 11th of Sept. in the year, viz. by the space of a Month next following after the said 10th day of August, did not repair to the Parish-Church of *C.* aforesaid, nor to any other Church, Chappel, or usual place of Common-Prayer and Divine Service, any Lords day or other dayes ordained or used to be kept as *Holy-days*, happening between the said 10th day of August, and the said 11th day of Sept. but voluntarily and obstinately hath forborn the same by the said space of a Month, the said *A. B.* not having any Lawful or reasonable Excuse or Impediment to be absent: *Contra formam Statuti in huiusmodi casu editi & provis. in Contempt. dicti Domini Regis, nec non contra pacem, &c.*

The Defendant Pleads *Non Culp.* that is to say, *Not Guilty.*

The matter coming on to Trial, if the Defendant (or his Council) moves, that the *Prosecutor* may be called; (for 'tis said, there is a Rule of Court, that on the Prosecutors not appearing, the Defendant is to be acquitted. However, be there such a Rule or not, upon the Reasonableness of the Ground thereof, I conceive) if the *Prosecutor* do not appear, the Defendant may move for his Acquittal, and ought to be Discharged.

Obj. If it be Objected, that the Proof lies on the Defendants part, and that he ought to prove his Being at Church:

Ans. It may be Answered, that the Defendant as to all parts of the Indictment (other and except only so much thereof as concerneth going to any Parish Church other than his own, and his having a lawful Impediment) denies the said Allegation, and is not bound to make any such Proof.

For tho' the Proof may not be expected on the Prosecutors part, of the Defendants not going to other Churches, &c. because of the multitude of them, and

the impossibility of making such a Proof; yet the Clause that the Defendant was not at his Parish Church, is a matter of Fact, and a matter of Fact (which over and above the Proof of the Defendants being a Parishioner all the Months laid in the Indictment, and above sixteen years, which is likewise necessary) ought to be proved, and for default thereof the Defendant to be Acquitted.

And therefore the Defendant may insist and stand upon it, and that for these Reasons.

1. For that the being or not being of the Defendant at his Parish Church, doth or may lie in the Knowledge of the *Prosecutor*, and without such Knowledge a *whole Town*, or any great number of Persons (if such a Practice should be allowed) may be Indicted and put to needless Trouble and Charge; nay, and perhaps Convicted too wrongfully; for questionless a man going to do a lawful Act, at a lawful place, is not bound to carry Witnesses with him.

2. Because, touching not coming to Church there are three Statutes, viz. 1 *Eliz.* 23 *Eliz.* and 3 *Jacobi*. Now this Indictment is grounded on the two first; not coming to his Parish Church being against 1 *Eliz.* and not coming to some Church, or any Church against 23 *Eliz.* which also refers to 1 *Eliz.* for it saith, *He that shall not come, contrary to the Statute of 1 Eliz. now 3 Jacobi saith* — If any one resort not, &c. and hear Divine Service, &c. according to the Statute made 1 *Eliz.* He may within a Month after the Offence done, if he cannot make some good Excuse for his Absence, be Convicted before one Justice, [Note the manner how, not for want of Proof on his part of his being at Church, but] upon his own Confession, or the Oath of one Witness: Note again, It saith not, If he cannot prove he was at Church, but if he cannot make Excuse; the Proof of the Impediment lies on him, if he alledge any, but his not being at his Parish Church must be proved at least by one Witness: So this Indictment being grounded on 1 *Eliz.* as well as 23 *Eliz.* for that by the 3 *Jac.* a Conviction for 12 d. cannot be without Confession of the Party, or Oath of one Witness; it cannot be imagined that a Conviction for 20 l. should be on less Evidence, or no Evidence at all, or that less proof should serve in the one Case than in the other.

3. For that the Law allows of a Plea of *Non Culp.* (not Guilty) to these Indictments, and where that Plea is allow'd, the Proof lies on the other side, unless it be otherwise Enacted and specially Provided: As for Landing-Goods, Custom not being paid, by the Statute *Omnis probandi*, is expressly laid on his part that claims the Goods; which shews or plainly implies it lay not on his part before, for then that Clause of the Act had been needless; but in this Case there is no such Provision: And Query, If the Proof lay on the Defendants

defendants part, whether *Not Guilty* would have been a good Plea?

4. For that, the Law presumes no man to be an Offender till proved such, and is more prone to Acquit than Condemn, therefore there being no Evidence to the contrary, it is to be presumed rather that the Defendant did his Duty and went to Church, than without Evidence to presume the contrary.

5. For that the Jury are sworn to try the Issue joined, viz. whether Guilty or Not Guilty, according to their Evidence; so not as a matter of Form, rashly, by Implicit Faith, or in Complemental Obedience, nor upon trust, belief or presumptions; but upon Evidence, that is, a sufficiency of Sworn Witnesses, and other Proofs to a Jury for finding an Issue, and so called, because thereby the point in Issue is to be made Evident to the Jury — *Probationes debent esse Evidentes, & luce clariores.*

Obj. It may be Objected, that not going to his Parish Church is a Negative.

Ans. But it is such a Negative as may be proved, and to make a man an offender, it must, for the Reasons above, be proved.

Obj. If it should be pretended, that the Grand Juries finding it, is a sufficient Evidence for the other Jury.

Ans. It is to be answered, that it neither is so, nor hath been so taken; nor their Verdicts, or finding offered as Evidence to the other Jury. Nothing being more common, than when a man is Indicted, tho' the Bill found by the grand Inquest, yet if no Evidence come against him at his Tryal, for the Court to direct the petty Jury to acquit him.

Obj. It may in this Case be alleadged, that the Defendant is reputed a *Phanatick*, one that is reported not to go to Church, and so it is to be presumed he goes not.

Ans. Indictments are to be found on credible Witnesses, plain and direct proof, and not probabilities or Inferences, neither upon Hearsay's, Reports or the like. Neither in such a Case as this, on any of the Jurors own Information, unless they were constantly during the Month all Sundays and Holy-days at the Church, and do know, and did take Notice that the Defendant was not there.

These Arguments and Reasons carry such weight, that I conceive the Defendant must thereupon be discharged for want of Evidence, or at least may move to have it specially found, and let the Jury refer it to the Law, viz. If the matter and Evidence be sufficient in Law to maintain this Issue, then they find it, otherwise not.

If any Witnesses appear against the Defendant, he may Examine them:

1. How they know *A. B.* lived in the Town that month, and in what house, and how they know him to be above sixteen years of Age?

2. Whether the Witness himself were constantly at Church every Sunday, Holy-day and time when Divine service was said there all that month, &c?

And then the Defendant hath this further to answer, that he is a *Protestant*, professing the Protestant Religion, and no *Papist* or Popish Recusant, and so not within the Acts made against *Papists* and Popish Recusants, consequently *not Guilty* as to any Indictment founded upon them.

And if he prove himself a Protestant, and no Popish Recusant, the defence seems very strong for these reasons, which Evince Protestants not to be within those Acts; As

1. For that another Act is made against dissenting Protestants, and a severe one too, viz. 35 Eliz. in which *Papists* and Popish Recusants are not included, but exempted. And if Protestants be also in 23 Eliz. then the Laws are more severe against them than *Papists*, and they are in a worse Case, which (in those times, there being so many Popish Plots against the Queen) is not reasonably to be presumed.

2. The Preamble of this Act of 23 Eliz. and the former part thereof, shews it made against Popish Recusants: See also Sir *Simon Diggs Journal* of all the Parliaments in that Queens Reign.

3. The Act of 7 Jac. Cap. 6. saith, If a married Woman (being Lawfully convicted as a Popish Recusant for not coming to Church) shall not, &c. which shews that Convictions on 23 Eliz. are Convictions of parties as Popish Recusants; therefore the Defendant being no *Papist*, cannot be Convicted on that Act.

And as to this point too, the Defendant (if he see cause) may move to have it specially found, and if Over-ruled, tender a Bill of Exceptions.

Lastly, The Defendant may insist upon this, That he doth go to Church, and so Conform, and if he prove this, it seems sufficient for his Acquittal.

Obj. If it be objected, that he ought to prove he went to Church during the Month in the Indictment, and that his going since is not sufficient.

Ans. I do conceive in this Case his going since being proved, is sufficient. For,

1. Before Prosecution the Defendant might not be so exact to take Witnesses as he is now, and it may puzzle many a very good Church-man to prove upon Oath his being at Church in February last. But from the Defendants going now, it is to be presumed he went before — *Justitia semper sequitur mitiorem partem.* Justice always makes the most favourable Constitution.

2. The Act of 23 Eliz. saith, Every person Guilty of any offence against the Act (except Treason) who shall be thereof Indicted, or at his Arraignment or TRIAL before Judgment Submit and Conform himself before the Bishop of the Diocels, &c. or before the Justices where he shall be Indicted, Arraigned or Tried (having not before made Submission, &c.) shall upon his Recognition of such Submission, in open Assizes or Sessions of the County where such person shall be Resident, be discharged of all and every the said Offences against that Act (except Treasonable) and of all pains and Forfeitures for the same.

Now, the Defendants going to Church (by him proved) is an Actual Submission, or as much as performance of a Submission, and so more than a Promise, and is an Evidence of his going before. And especially if no proof to the Contrary, a good Evidence for his Acquittal.

Lex plus Laudatur quando Ratione probatur.